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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 816

CARL ALDO MARZANI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The main opinion of the Court of Appeals (R. 272-281) and the opinion on petition for rehearing (R. 292-293) are not yet reported. The opinion of the district court on motion to dismiss the indictment (R. 20-30) is reported at 71 F. Supp. 615.

JURISDICTION

The judgment of the Court of Appeals was entered February 2, 1948 (R. 282), and a petition for

rehearing (R. 283-290) was denied April 22, 1948 (R. 294). The petition for a writ of certiorari was filed May 22, 1948. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether Section 35A of the Criminal Code, which interdicts the wilful making of a false or fraudulent statement in any matter within the jurisdiction of a department of the United States, reaches a willfully false oral statement of material fact to a responsible official of the State Department, who was charged with determining whether petitioner was a security risk and should be permitted to hold office in that Department.

2. Whether petitioner was prejudiced by the alleged error of the trial judge in not excluding the first nine counts of the indictment on the ground that they were barred by the statute of limitations.

3. Whether the trial judge excluded otherwise admissible evidence because of its possible prejudicial effect on the jury, the jury having among its members nine Negroes.

STATUTE INVOLVED

Section 35A of the Criminal Code (18 U.S.C. 80) provides:

> Whoever shall make or cause to be made or present or cause to be presented, for payment

or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; *or whoever shall knowingly and willfully falsify or* conceal or cover up by any trick, scheme, or device a material fact, *or make or cause to be made any false or fraudulent statements or representations,* or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry *in any matter within the jurisdiction of any department or agency of the United States* or of any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both. (Italics added.)

STATEMENT

On January 17, 1947, petitioner was indicted in the United States District Court for the District of Columbia in eleven counts for having made false and fraudulent statements to representatives of government agencies in the course of an investigation as to his character and fitness for federal employment, in violation of Section 35A of the Crim-

inal Code (18 U. S. C. 80) (R. 2-19). After a jury trial, he was convicted on all counts (R. 45-46) and sentenced generally to imprisonment for a period of from one to three years (R. 47). Upon appeal to the United States Court of Appeals for the District of Columbia, the judgment was affirmed as to counts 10 and 11 and reversed as to the first nine counts on the ground that they were barred by the statute of limitations (R. 282, 294).

The evidence in support of the judgment may be summarized as follows:

The making of the statements. On March 7, 1942, petitioner was given an indefinite appointment to the position of Junior Economic Editor in the Office of the Coordinator of Information, subject to a character and fitness investigation (Gov. Ex. 8). On July 29, 1942, in the course of the investigation, petitioner, while under oath, was interrogated by an agent of the Federal Bureau of Investigation. The stenographic transcript of the proceedings (R. 244-246) discloses that petitioner denied that he ever had been a member of the Communist Party (count 1); that he ever had attended meetings of the Communist Party (count 2); that he ever had contributed services to the Communist Party (count 3); and that he ever had participated in any of the activities of the Communist Party (count 4).

On November 23, 1942, in the further course of the investigation, petitioner, while under oath, was interrogated by an agent of the Civil Service Com-

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mission. The stenographic transcript of this proceeding (R. 246-249) shows that petitioner denied that he had ever been a member of the Communist Party (count 6); and that he had ever made any speeches against conscription (count 7).

Petitioner was rated ineligible for federal employment and on February 10, 1943, he took an appeal to the Civil Service Commission's Board of Appeals and Review. A hearing was had on April 20, 1943, and petitioner, testifying under oath, stated, *inter alia,* that he had never used the name or had been known as Tony Whales (count 8), and that he never had made any speeches against conscription (count 9) (R. 249-250). The Board of Appeals and Review reversed the earlier determination and rated petitioner as eligible for federal employment (Gov. Ex. 32; Tr. 334-335).[1]

Petitioner remained in federal employment until August or September 1943, when he was inducted into the Army (R. 173). The Army assigned him to his former job, which was then in the office of Strategic Services (R. 173-174). In September 1945, petitioner was discharged from the Army and he resumed his civilian position, which was then in the State Department, as a result of a transfer of functions from the Office of Strategic Services (R. 175). He was Deputy Chief of the Presenta-

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[1] Note should be taken of the fact that evidence which later became available and constituted the bulk of the Government's case in the trial court was not then available and, of course, was not considered by the agencies of the Civil Service Commission (see R. 68).

tion Division and was engaged in the preparation "of reports for high officials in the State Department in a form which was quicker and more concise and clearer, and so on" (R. 175).

The State Department had established a Security Division for the purpose of screening employees absorbed from other agencies. The situation in respect of petitioner was brought to the attention of the Deputy Assistant Secretary for Administration, Mr. Panuch, and on April 30, 1946, he directed a subordinate to request petitioner's resignation from the State Department (R. 47-48). On June 1, 1946, after he had been requested to resign, petitioner obtained an interview with Mr. Panuch for the purpose of discussing the security matter in which he was involved (R. 48). Panuch told (R. 49) petitioner that the charges against him were—

> that you were a Communist, a member of the Communist Party in 1940 and 1941, and that you were a Communist organizer; that you operated in front organizations in New York. * * * That you operated under the alias of Tony Whales; that your wife was a member of the Communist Party and that her Communist Party name was Edith Charles; that you opposed conscription; that you made a false statement with respect to your financial resources to get a job with W.P.A., and that statement was made under oath; and that you signed a petition as a member of the Communist Party for the * * * election of Earl Browder as Congressman.

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Petitioner specifically denied each charge (R. 49-50). His denial that he ever had been a member of the Communist Party (R. 50) is the basis for count 10 of the indictment, and count 11 is founded on his denial that he ever had used the name or had been known as Tony Whales (R. 50). Panuch testified (R. 52) that the conference lasted over two hours and "was in the nature of an appeal" from his subordinate's request of petitioner that he submit his resignation. According to Panuch, "the man was appearing before me as Deputy Assistant Secretary, and he was entitled to have his day in court, and we just threshed the matter out thoroughly" (R. 52).

Thereafter, a further investigation of petitioner's activities was conducted and this disclosed convincing proof of the charges made against petitioner, for information was obtained from New New York City Detective Drew (see, *infra*, pp. 8-15) concerning Drew's undercover activities in the Communist Party and other groups, at a time when petitioner also was active in those various organizations (R. 54). In November 1946, petitioner sought to resign from the State Department (R. 54-55), but that agency discharged him in the interest of the United States (Gov. Ex. 35, Tr. 286, 360).

The falsity of the statements. To establish the falsity of the statements in question the Government relied principally upon the testimony of New York City Detective Drew who, in the performance of his duties, had infiltrated into the Com-

munist Party and other groups dominated by it, and the testimony of two former members of the Communist Party.

Drew testified that in the performance of his assigned police duties, he joined the Communist Party on July 22, 1940, using the name "William Easley," and that petitioner was present in the office when he joined (R. 92-93). Drew paid his fees and was issued a Communist Party membership book (R. 93). That evening Drew attended a meeting presided over by petitioner's wife (R. 93, 94), a member of the Communist Party (R. 231). Petitioner was among those present, and was introduced to Drew as Tony, a national committeeman (R. 94).[2] The presiding official at the meeting, petitioner's wife, stated, *inter alia,* that the country was on the verge of an imperialist war; that the time was ripe to bring to the people the need for peace and the Communist Party; and that the comrades should all support Congressman Marcantonio in all his endeavors (R. 94). Detective Drew further testified to the following events, occurring respectively on the dates noted:[3]

July 23, 1940: Drew attended a class for recruits in the Communist Party at local headquarters for the organization. Petitioner conducted the class

[2] Approximately one month later Drew learned that petitioner's name was Tony Whales (R. 94).

[3] In the course of his testimony, Drew, for the purpose of refreshing his recollection, frequently referred to reports he made to his superiors in the police department at the time of the events in question (R. 97).

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and instructed those present on the subjects of race discrimination, white chauvinism, and the principles of communism (R. 96-97).

July 29, 1940: Drew reported to petitioner, his organizer, at local Communist Party headquarters concerning his activities on a petition campaign. Petitioner told Drew that he was pleased and that "he could see that I had the makings of a good comrade" (R. 97).

August 6, 1940: After attending a recruit class at the Section Headquarters of the Communist Party, Drew, petitioner and others assembled in the main room where one Appel, a section organizer,[4] informed them of a mass demonstration to be held that night at Times Square, and instructed them to leave all identification possessed on their persons at the Communist Party headquarters in order that "if the police did pick us up we would not have anything to identify us as being Communists" (R. 98).

August 9, 1940: Drew attended a meeting of Branch F-2 of the Communist Party, at which

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[4] The Communist Party in New York City was divided into sections, located in the various assembly districts. At the head of a section is a section organizer, who has an executive secretary, executive educational director and executive daily worker manager. Each section also has an executive committee. A section is composed of many branches and each branch, in turn, is composed of many groups. The offices in the subdivisions are comparable to the offices in the section. Petitioner was a branch organizer—a leader of a branch—and a member of the section executive committee. He also held office as a section educational director (R. 101-102).

petitioner delivered a speech against conscription (R. 98-99).

August 12, 1940: Petitioner requested Drew to turn in his Communist Party membership book. Petitioner told Drew that "I want your card in order that the name may be changed, so as to protect you on your job against anything that may happen by the Government if they happen to outlaw the Communist Party and they would find out that you are a member, it would throw you out of your job." Drew surrendered his card to petitioner and the two then attended a Communist Party meeting (R. 99).

September 3, 1940: Drew attended a regular Branch meeting, at which petitioner presided. After the meeting had commenced, Appel, a section organizer, came in and took the floor. He told the members present that it was "control week" and that "all the membership books, papers and records in the Communist Party were going to be burned * * * so that there would be no record left to reveal his [the member's] identity or any of the records pertaining to the Party." Petitioner then resumed control of the meeting and called for a delegation to go to Congressman Ellenstein's home to protest the then pending draft legislation, it being understood that the protestors would do this as "citizens" and not "Communist members" (R. 100-101).

September 5, 1940: Drew attended an open air meeting presided over by petitioner. Petitioner

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opened the meeting by stating that the meeting was called by the Communist Party of the Sixth Assembly District. The meeting was concerned with steps to defeat the pending draft legislation. One of the speakers was petitioner's wife, who was introduced by petitioner as "Comrade Edith" (R. 102-103).

September 16, 1940: Drew attended a regular Branch meeting of the Communist Party. In the course of the meeting petitioner came in and announced that he wanted to discuss with the Branch the question of expelling two comrades. Petitioner said that these two "were not participating as Communists, they did not canvass, they were afraid to circulate as Communists, and he felt they should be expelled" (R. 103-104).

October 14, 1940: Drew attended a regular Branch meeting of the Communist Party. This was subsequent to the enactment of the Selective Training and Service Act. During the meeting petitioner came in and asked to speak, stating that "now the young men in the Communist Party must get into the Army so that we can disintegrate the morale of the men in order that the Communists may take over; that we could do a big job in helping the men with their grievances, forcing their fights, and teaching them Communism. In this way we could soon overthrow the Capitalists and also take over control of the Army. We were to work on the officers as well as the men, and this job was espe-

cially assigned to young men of conscription age" (R. 104-105).

October 17, 1940: At petitioner's request, Drew joined him at local Party headquarters for the purpose of folding literature and cleaning the office. They each discussed their reasons for joining the Communist Party and in the course of the conversation petitioner said that he had also caused his wife to join the Party (R. 105-106).

November 20, 1940: Drew and Appel, the section organizer, were working at local Party headquarters burning records and literature when petitioner came in. Drew told petitioner that he and several other Negroes that had been Party members were organizing the National Negro Congress, and petitioner expressed satisfaction with the work that Drew was doing (R.106-107).

November 25, 1940: Drew attended the regular Branch meeting of the Party, at which petitioner was present (R. 107).

December 2, 1940: Drew attended a regular Branch meeting of the Communist Party. At the meeting, petitioner advocated an increase in their activities in recruiting new members and announced "a general functionary's meeting to be held for the purpose of receiving the report" on the recent Communist Party convention (R. 107-108).

December 9, 1940: Drew attended a regular Branch meeting, at which petitioner exhorted those present to sell more copies of the Daily Worker and

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the Sunday Worker and to stir up opposition to the Smith-Connolly Bill, which was then pending in Congress, on the ground that the bill would outlaw strikes and thus was against the principles of the Communists (R. 109-110).

December 16, 1940: Drew attended a regular Branch meeting, at which petitioner presided. Those present were instructed on how to prepare leaflets and to duplicate them (R. 111).

January 31, 1941: Petitioner and Drew were present at a social affair of the National Negro Congress. Drew introduced petitioner to those present as Tony Whales, a member of the Communist Party (R. 111).

February 11, 1941: At a meeting at local Party headquarters, petitioner introduced Drew to one Daniels, a new section organizer. Drew discussed his work with the National Negro Congress, and petitioner counselled him in steps to be taken in the future, assuring Drew that the Communist Party "would be back of us and would give us all their assistance" (R. 111-112).

February 22, 1941: Drew met with members of the Communist Party Section Executive Committee composed of petitioner and three others. Drew discussed the National Negro Congress. Petitioner, as Section Educational Director of the Communist Party, was assigned to assist Drew in preparing literature for the National Negro Congress, and it was agreed at the meeting that the Communist Party's office and machines were to be used

for this purpose. Following the meeting petitioner and Drew prepared a leaflet "about discrimination" (R. 113).

February 28, 1941: Drew went to Petitioner's home to obtain certain leaflets and observed a Communist Party meeting taking place at the time (R. 114).

March 18, 1941: Drew attended a meeting of the National Negro Congress at which petitioner, one Louis Harper (see, *infra*, pp. 15-16) and Drew spoke. Petitioner was introduced to the gathering as Tony Whales (R. 114-115).

April 3, 1941: Drew called and attended a meeting of all Communist Party members in the National Negro Congress and "progressives from other organizations." Petitioner told those present that he could not remain at the meeting, but announced that Louis Harper (see, *infra*, pp. 15-16) was going to conduct a class for the Communist Party, with Negroes from the National Negro Congress and other organizations, and that he "wanted all the colored comrades to attend this class." Petitioner also stated that those present needed studying and education along the "party line" (R. 115-116).

April 4, 1941: Drew attended a meeting sponsored by the National Negro Congress. Petitioner delivered a political discussion, speaking about how many Communists were in this country at that time and stating that "we outnumbered the number of Communists in Russia during 1917 when the revo-

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lution took place"; that "now was the time for revolution"; and that "the Communists could have a revolution in this country." He also urged those in attendance to attend the class being conducted by Harper and to attend the Worker's School, for the betterment of their organization (R. 116).

May 28, 1941: A meeting was held at petitioner's home, at which members of the National Negro Congress met with the Section Executive Committee of the Communist Party. Petitioner, Drew and Harper were among those present. The meeting was concerned with the downfall of the National Negro Congress on the East Side and with plans for rebuilding the organization "without the visible aid of the Communist Party" (R. 116-117).

September 3, 1941: Drew talked with petitioner at Communist Party headquarters (R. 121).

September 22, 1941: Drew visited the home of one Mary Farnum for the purpose of attending a Communist Party Executive Committee meeting, which was cancelled. While he was there, petitioner brought leaflets to Farnum, stating that it was her responsibility to see that the comrades distributed them (R. 121-122).

Louis Harper, another government witness, gave testimony that substantiated important aspects of Drew's testimony. Harper was a regular member of the Communist Party from 1932 to 1938 and attended some meetings thereafter (R. 71, 73, 78). He met petitioner in 1940 and knew him as Tony Whales (R. 72). Later Harper came to know peti-

tioner as Carl Marzani, as a result of their membership in two other organizations (R. 72). He attended a meeting of the Communist Party at which petitioner and "Bill Easley" were present[5] (R. 73). Harper testified concerning activities on his part and on the part of Drew and petitioner in behalf of the National Negro Congress (R. 74-79), and that petitioner participated in those activities as a representative of the Communist Party (R. 77-78).

Another government witness, George Hewitt, was a member of the Communist Party from 1927 to 1944 (R. 255). In 1930 he went to Russia and remained there for about two years, during which time he attended the International Lenin School. The purpose of the schooling was "learning espionage"; learning how to become "professional revolutionist"; and learning theory "that would ultimately lead to the overthrow of the United States Government" (R. 255). In 1940 Hewitt was a teacher in the Communist Party's Workers School (R. 256). He used the name "Tim Holmes" to conceal his identity (R. 256). Detective Drew, using his pseudonym of "Bill Easley," was a student in the school (R. 256). Through Drew, Hewitt met petitioner in 1940 and knew him as Tony Whales (R. 257), the Educational Director of a section of the Communist Party (R. 257-258).

[5] Harper did not know until the time of the trial that "Bill Easley" was in fact Detective Drew (R. 73.)

Hewitt met petitioner a second time at the State Headquarters of the Communist Party in New York City, at an educational organizer's meeting (R. 260-261).

In the course of his testimony for the defense, petitioner admitted knowing Harper (R. 185), but denied ever having known Hewitt or Detective Drew (R. 193). On cross-examination, he admitted that he signed and was active in securing signatures on a petition for the nomination of Earl Browder on the Communist Party ticket, as a candidate for representative in Congress, at an election that was held on February 6, 1940 (R. 218-221; see also R. 222-228).

ARGUMENT

Of the three contentions made by petitioner, the first two stem from the fact that the court below determined that the statute [6] suspending the run-

[6] 18 U.S.C., Supp. V, 590a provides:

"The running of any existing statute of limitations applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner, or (2) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the present war, or with any disposition of termination inventory by any war contractor or Government agency, or (3) committed in connection with the care and handling and disposal of property under the Surplus Property Act of 1944, shall be suspended until three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress. This section shall apply to acts, offenses, or transactions where the existing

ning of the statute of limitations for offenses involving the defrauding of the United States or any of its agencies does not apply to the offenses here, and that the first nine counts of the indictment—involving false statements during the period from July 29, 1942 to April 20, 1943[7]—were therefore barred by the normal three-year period of limitation.[8] It was the view of the court below (see R. 274-276) that the suspension statute applied only to frauds involving property or financial loss to the Government. This aspect of the court's decision was favorable to petitioner, and he, of course, does not challenge it in this Court. Already this Term, we have expressed our firm disagreement with the construction of the suspension act adopted by the court below, on the primary ground that it is in the teeth of the legislative history of the provision, which discloses a specific congressional intent to have the suspension statute apply to offenses under Section 35A of the Criminal Code, which is the provision involved in this case. See our brief in opposition, pp. 25-35, in *Harold Gottfried and Pure Rock Mineral Springs Corporation* v. *United States*, No. 561. That case squarely presented the question whether a false statement made to a local war Price and Rationing Board, in violation of Section 35A of the Criminal Code, was within the

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statute of limitations has not yet fully run, but it shall not apply to acts, offenses, or transactions which are already barred by provisions of existing law."

[7] The indictment was returned January 17, 1947 (see R. 273).

[8] See 18 U.S.C. 582.

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terms of the suspension act. The Second Circuit held that it was and rejected the view adopted by the court below. *United States* v. *Gottfried*, 165 F. 2d 360, 367-368. And we strongly oppose a petition for a writ of certiorari, which relied, *inter alia*, upon this phase of the opinion of the court below. It should be noted, however, that we pointed out that the opinion below on this point was a dictum since the general sentence was supported by counts 10 and 11. Certiorari was denied March 29, 1948, and a petition for rehearing was denied April 26, 1948. Only if either of the first two contentions urged by petitioner is meritorious is there any occasion to reach this question in this case. Since we perceive no merit in them, we do not at this time press upon the Court our construction of the suspension act[9]—and thus create a possible basis for certiorari.

1. Petitioner's first contention (Pet. 16-23) is that counts 10 and 11 do not charge violations of Section 35A of the Criminal Code because the false statements in question were made informally and were not made under oath and were not stenographically transcribed. Section 35A proscribes "whoever shall knowingly and willfully * * * make or cause to be made any false or fraudulent

[9] Since we are entitled to support the judgment of the court below on any available ground, this point is open and might be asserted in this Court, if necessary. See *Helvering* v. *Gowran*, 302 U. S. 238, 245; *Securities Comm'n* v. *Chenery Corp.*, 318 U. S. 80, 88.

statements or representations * * * in any matter within the jurisdiction of any department or agency of the United States * * *." Count 10 (R. 16-18) alleged, *inter alia,* that on June 1, 1946—

> * * * during a conference with a duly authorized officer of the said State Department, who was then and there inquiring into the character and fitness of the said defendant for continued employment by the said Department for the purpose of making recommendations to the said Department concerning the matter of continuing or terminating the aforesaid employment, the said CARL ALDO MARZANI falsely stated and represented that he had never been a member of the Communist Party * * *.

Count 11 (R. 18-19) similarly charged that petitioner falsely stated during the conference that he had never used the name or had been known as Tony Whales.

In evaluating petitioner's contention, it is important to note at the outset that there is no dispute of the fact that petitioner made the statements in question under the circumstances alleged in the indictment. Petitioner does not deny that they were made in a matter within the jurisdiction of a Department of the United States (see R. 23-24). And he does not dispute the fact that the jury had ample basis for concluding that he knowingly and willfully made the false statements. Thus each of

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the elements of the offense as described by Section 35A is indisputably present.

Petitioner's argument is that his deception is not punishable because he was not first sworn and because there is no stenographic transcript of the conference. But this is not a prosecution under the perjury statutes, where an oath is a requisite. Nothing in Section 35A distinguishes deception practiced without an oath from deception with an oath. Similarly there is no requirement that only deception which is stenographically transcribed is punishable. The short of the matter is that the evil is the same in either situation, and Congress quite properly has proscribed it. See *United States* v. *Gilliland*, 312 U. S. 86, 93. In dealing with the statute in question, the Second Circuit in *United States* v. *Zavala*, 139 F. 2d 830, 831, said: "We feel no doubt that Section 80 [Section 35A of the Criminal Code] covers both the use of documents to defraud the government and also the use of any false statement, whether oral or written, as to any matter within the jurisdiction of any department or agency of the United States." [10]

In applying the statute to the facts of this case, we must not be unmindful of the fact that the Government has not sought to prosecute for a false statement made by one of its employees to another in a casual discussion, where the urgent necessity

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[10] See, too, *Spivey* v. *United States*, 109 F. 2d 181, 184-185 (C.C.A. 5), certiorari denied, 310 U. S. 631.

for truthfulness might not have been plain. In this case petitioner knew long before he made the statements in question that there was serious question concerning his employability because of evidence that he had been a member of the Communist Party while using the name Tony Whales. It is evident that when petitioner was requested to terminate his position with the State Department he knew the reasons for the request. He did not seek any formal hearing in an effort to have the request withdrawn. Instead he went to the Deputy Assistant Secretary for Administration, Mr. Panuch, who had determined that petitioner was not suitable for employment in the State Department, and sought to persuade him that the charges against him were untrue.[11] It is evident from the testimony concerning the conference that it was not a casual one in which no one realized that the stakes were high. Mr. Panuch testified that at the opening of the discussion he informed petitioner that he had authorized the request that petitioner resign, and that there were "substantial" security reasons for the request (R. 48-49). Then Mr. Panuch detailed the charges against petitioner and

[11] It is idle to urge, as petitioner does (Pet. 19), that the interview was not in conformity with regulations which provide for the hearing of charges against employees. Petitioner previously had had such hearings before the Civil Service Commission (see, *supra*, pp. 4-5). When he was requested to resign, he did not want or seek another hearing. Instead, he wanted a private conference with the executive of the Department responsible for the request. Having obtained precisely what he sought, he is hardly in a position to complain now that the procedure which he selected should not have been pursued.

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petitioner, in turn, specifically denied each one (R. 49-50), stating, *inter alia,* that "I am not and never was a member of the Communist Party" and that "I was never known as Tony Whales" (R. 50). Petitioner referred Mr. Panuch to the findings in the earlier Civil Service investigation; to his religious background as evidence that he was not a Communist; and he sought to persuade him that the charges resulted from the fact that the personnel of the Security Office of the State Department "were a bunch of country boys who didn't know the difference between a Communist, a liberal, an anarchist, and a Socialist" (R. 51-52).

That Mr. Panuch regarded the matter seriously, and not as mere casual inter-office conversation, is shown by his testimony that the conference lasted over two hours and "was in the nature of an appeal." In Mr. Panuch's words, "the man was appearing before me as Deputy Assistant Secretary, and he was entitled to have his day in court, and we just threshed the matter out thoroughly" (R. 52).

The short of the matter is that petitioner sought an interview with Mr. Panuch, with whom he testified he had "a good personal relationship" (R. 176), for the purpose of persuading him that he was not a security risk. That his denials were persuasive is demonstrated by the fact that the request for petitioner's resignation apparently was not pressed after that until several months later when the extremely damaging information that Detective

Drew had became known to the State Department. Thus, false statements which succeeded in enabling petitioner to remain in a responsible position in the State Department are the basis for his conviction.

It does not avail petitioner to urge that Section 35A is too vague to have informed him that his conduct was punishable. Quite plainly, petitioner was capable of knowing that an inquiry into the question whether he, a responsible official of the State Department, was a security risk to the Department related to a matter within the jurisdiction of the Department. And petitioner does not deny that it was such a matter. Similarly, there is no difficulty in understanding that a deliberate lie as to a material fact is a false or fraudulent statement within the meaning of the statute. Petioner's willful purpose to deceive, as the jury found, is hardly consistent with his present plea of possible surprised innocence.

2. Having succeeded on appeal in obtaining the reversal of his conviction on the first nine counts on the ground that they were barred by the statute of limitations, petitioner now urges (Pet. 23-31) that his conviction on the remaining two counts should also be set aside because evidence on the other counts was received at his trial and the counts were submitted to the jury. In rejecting this contention, the court below held—properly, we believe —that the evidence adduced in support of the first

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nine counts would have been admissible under the last two counts, and that petitioner was not prejudiced by the fact that it was shown that he earlier had also denied to the Federal Bureau of Investigation and the Civil Service Commission that he had been a member of the Communist Party and had used the alias Tony Whales (see R. 276-277).

In seeking to prove the allegations of count 10, that petitioner willfully misrepresented that he had not been a member of the Communist Party in 1940 and 1941, the Government, we submit, was entitled to show any conduct by petitioner which would permit the jury to infer that petitioner was a member of the Party during those years. Such conduct is shown by the evidence which is summarized in the Statement, supra, pp. 4-17. Nothing in the trial record suggests that the evidence was received only in respect of any of the first nine counts. Instead, it is plain that the common thread through all the counts of the indictment was petitioner's relationship to the Communist Party, and evidence showing this was probative as to each of the counts.[12]

Petitioner also urges (Pet. 28-31) that evidence

[12] Petitioner is wrong in his contention (Pet. 25-28) that evidence of other crimes was used against him. As we have said, the Government's evidence as to petitioner's conduct in 1940-1941 was relevant to the issue whether he was a member of the Communist Party in that period. The fact that it might also be proof of other federal or state violations does not detract from its admissibility in this case. As stated by the Second Circuit in *United States* v. *Krulewitch*, 145 F. 2d 76, 80, "if evidence is relevant to prove one crime, it does not become inadmissible because it also proves another."

showing the circumstances of the making of the false statements involved in the first nine counts was prejudicial to him. Assuming, *arguendo*, that such evidence would not have been admissible under the last two counts, the evidence was not hurtful to petitioner. As the court below points out (R. 276-278), evidence showing that during his federal employment petitioner consistently denied to the Civil Service Commission and agents of the Federal Bureau of Investigation that the charges against him were true, supported petitioner's similar denials from the witness stand at his trial. It showed petitioner as steadfastly and consistently denying the charges against him. It is difficult to understand how evidence of such denials could possibly prejudice petitioner, unless and until the jury found that petitioner had been a member of the Communist Party and had used an alias. Once these findings were made, the jury could not very well have escaped a finding of guilt as to counts 10 and 11. The stringent tests for the application of the harmless error rule spelled out in *Kotteakos* v. *United States*, 328 U. S. 750, are, we submit, fully satisfied here.

Nor can we agree with petitioner (Pet. 31-33) that he was erroneously sentenced because of the inclusion of the first nine counts. Petitioner was sentenced generally to a term of from one to three years' imprisonment. In effect, the situation is no different than if the trial judge had imposed the same sentence on each count and then had

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directed that they be served concurrently. This aspect of the argument is foreclosed by *Pinkerton v. United States*, 328 U. S. 640, 641-642, which involved the same situation of a general sentence and some counts which were found on appeal to have been barred by the statute of limitations. If petitioner believes that the trial judge might not have imposed the same sentence if the first nine counts had been out of the case, his remedy is provided by Rule 35 of the Federal Rules of Criminal Procedure. Under that Rule he may, within 60 days after certiorari is denied or a mandate is handed down affirming the judgment, apply to the trial court for a reduction in sentence. By adhering to this procedure, petitioner will afford the trial judge an opportunity to make plain whether the sentence is more severe than it would have been if the first nine counts had been eliminated from the case.

3. Petitioner's final contention is that "the trial court excluded relevant, competent, material and important evidence, involving Negroes and Negro organizations, solely because of the supposed inability of the predominantly Negro jury in the case to weigh such evidence on the same terms as any other representative jury" (Pet. 33-35, 12-16). This contention is utterly lacking in merit and has absolutely no support in the record. The same argument was made in the court below and

was extensively considered and flatly rejected (R. 278-280).

The approach of the court below to the serious charge which petitioner makes was stated by the court as follows (R. 278-279):

> Because of the unique nature of this contention and the seriousness of the error if appellant's version of the reason for the disputed rulings by the court be correct, we have carefully read all the various portions of the printed appendix surrounding the incidents mentioned, although appellant does not cite to us any specific place at which the court indicated such reasons for its rulings. * * * [Appellant's] general statements and the implications are such as to require examination of all that transpired.

The Court of Appeals then discussed in detail each of the three incidents upon which petitioner relies. Not only did the court fail to find that the trial judge's rulings were motivated by the reasons petitioner suggests, but also the court found that the rulings were correct (R. 279-280). In these circumstances, there is no occasion to restate here what the court already has fully stated. The opinion below plainly demonstrates the complete lack of merit in the contention.

CONCLUSION

Petitioner does not contend that the charges against him are not fully sustained by the over-

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powering evidence of guilt set forth in the Statement. The contentions which he does make present no question of merit which requires this Court's examination. We respectfully submit that the petition for a writ of certiorari should be denied.

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